No. 9397

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED CIGAR WHELAN STORES CORPORATION, a Corporation, and EDGAR DEHNE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Appellants were charged by indictment with carrying on the business of retail liquor dealer, selling denatured alcohol in violation of law and Treasury Regulation No. 3, as amended, and for the sale of denatured alcohol for beverage purposes when the immediate containers did not have affixed thereto the required strip stamp, and for possessing the alcohol with intent to sell.

The evidence disclosed that the corporate appellant carried on the business in Butte, Montana, in a small storeroom or building approximately twenty feet long and twelve feet wide (R. 92); that the appellant Dehne had

been manager for 12 years (R. 143); that one clerk was employed regularly and one relief clerk employed (R. 143) and that Dehne, himself, acted as clerk and there was only one clerk on duty at a time (R. 143). That for sometime prior to January 12, 1939, the appellants had been selling rubbing alcohol for beverage purposes with no restrictions whatsoever (R. 59 and 187). The government officers, becoming aware of this business, on June 14, 1938, entered the store, gave the appellant Dehne a copy of the regulation, read it to him, and warned him to discontinue the practice of selling for beverage purposes and to drunks and dehorners (R. 83). (Dehorner is one that drinks rubbing alcohol) (R. 114). Again on January 2, 1939, the officers of the government went into the place of business of the appellants and warned them to cease the practice of selling this alcohol for beverage purposes (R. 83, 57-59). The appellant Dehne replied that he received the alcohol from the company's headquarters in San Francisco and that so long as they continued to send it to him he would sell it to anyone who came in and asked for it (R. 59, 84, 85 and 148). Dehne testified (R. 158) that it was his duty as manager to sell anything the company shipped him to sell. If they instructed him something was illegitimate to sell, he would not sell it, but that instructions by the Internal Revenue Agents that it was illegitimate to sell any article would not control his action.

The appellants have been selling in this store 144 bottles a week of rubbing alcohol. The owners and managers of various drug stores, some on the same street and some in the same block as the appellants' store, testified as to their sales of rubbing alcohol. The manager of the largest drug store testified their sales of rubbing alcohol ran

from 24 to 36 bottles a week (R. 104); another druggist's average sales were 18 a week (R. 115); another between 24 and 30 bottles a week (R. 119); another between 18 and 24 bottles a week (R. 123). A police officer of the City of Butte, who was stationed in front of the store, testified that between January 1, 1939, to the 15th of April, 1939, he had observed dehorners and rubbing alcohol drunkards going into and coming out of the place of business of appellants bringing out with them rubbing alcohol, sometimes wrapped and sometimes unwrapped (R. 110).

The government officers having information that the appellants were continuing to carry on the business, designated Julius Johnson, an officer of the Alcohol Tax Unit, to investigate (R. 81). In the progress of his investigation he dressed in such a way as to simulate a bum and entered the store to make purchases of alcohol. He first went into the store on the 9th of March, 1939, and bought a pint of alcohol from Dehne. An hour later he walked back and bought another pint from Dehne. Two hours later he walked back and bought another pint from the other clerk. An hour later he went in and bought another pint from the same clerk. The next morning in the forenoon he walked in and bought another pint from Dehne. Two hours later he walked in and bought another pint from Varco, asking both for another bottle of alcohol. Five hours later he walked in and bought another pint from the same clerk. Two hours later he went in and purchased another pint from the appellant Dehne, asking for another bottle of alcohol. He purchased eight pints in twenty-four hours (R. 63 to 68). On the 15th of April, 1939, in the morning, he went into the store and asked the clerk Maenpa for a pint of alcohol. When the clerk com-

menced to wrap it he asked him if he didn't have the other brand; that he liked the other brand to drink better than he did the one that the clerk was wrapping and the clerk responded no that was all he had and the agent said that was all right, he could drink it (R. 69, 70). About an hour and a half later he went back into the store, found the same clerk on duty and asked for four pints of alcohol, saying that the other pint didn't last long with four or five of them drinking out of it (R. 70). It is undisputed that the $25 stamp, required of retail liquor dealers, was not purchased or displayed in the building, nor did any of the bottles have any strip stamp on them.

I.

ARGUMENT.

THE EVIDENCE JUSTIFIES THE VERDICT OF THE JURY AND THE JUDGMENT OF THE COURT, FINDING THE APPELLANTS AND EACH OF THEM GUILTY OF THE OFFENSES SET OUT IN THE INDICTMENT.

Appellants contend that the evidence was insufficient to justify the verdict of the jury or the judgment of the court, in that there was no evidence produced that the purchaser, the government agent, of the rubbing alcohol intended to, or did use the purchased alcohol for beverage purposes, and without such intent on the part of the purchaser no violation of law was established, irrespective of the intent of the appellants, the sellers.

SUFFICIENCY OF THE EVIDENCE.

That the government established beyond any reasonable doubt that the appellants were carrying on the business

of retail liquor dealer by selling its denatured alcohol for beverage purposes prior to the 9th of March, 1939, cannot be disputed. This appears from the uncontradicted testimony of the agent when he informed Dehne that alcohol was being diverted for beverage purposes and he said he was aware of that (R. 59). It appears further from the statement of Dehne given to the agents (R. 96, Exhibit 16) where he says he has quit selling rubbing alcohol to anyone he thinks is buying it for beverage purposes. It is obvious that he could not quit selling it for beverage purposes unless he had theretofore been selling it for those purposes. It appears further from the statement of the clerk Varco (R. 99, Exhibit 17) where he said that he told the agent that in the future he would refuse to sell rubbing alcohol to any person whom he believed was buying it to drink. Each of them, in their statements, said that they did not sell to repeaters and defined repeaters as the same customer more than once in two or three days. It appears further in Dehne's testimony where he said he intended to continue selling rubbing alcohol as long as the corporate appellant supplied it to him to sell, but that he had cut down in selling to drunkards and dehorners (R. 149). That as manager it was his duty to sell anything the corporate appellant sent him to sell; that he intended to sell what it sent him to sell unless it told him it was illegitimate to do so, and irrespective of the statements or warning in that regard of Internal Revenue Agents (R. 158). Clerk Varco testified that after the warning of January it was talked over by Dehne, himself and the other clerk and they decided not to sell to those they figured were using it for illegitimate purposes (R. 183). Pregnant with the admission, before

that they were selling to those they thought were using it for illegitimate purposes, and again at page 187 Varco specifically testifies that prior to that time they sold to those that looked like they had been drinking it, or wanted to drink it, or were not going to use it for legitimate purposes. A police officer testified that continuously from January to April 15th the place was frequented by alcohol drunkards purchasing this rubbing alcohol (R. 110, 111). The government agent testified that just before January 12, he talked to a man who had been arrested and was just sobering up from a drunk. The police had taken a bottle of alcohol from him that he said he purchased from the store of the corporate appellant. (R. 161, 162). From the statement of the appellant Dehne and the clerks it is apparent that in selling the alcohol they made no inquiries of the individuals they sold to, made no effort to determine what purpose the alcohol was needed, or desired by them, used no care in its sale and sold it indiscriminately to any person who came in and desired it for any purpose.

The appellants' defense was not that they had not been engaged in the business, but that they quit the business prior to March 9th. This the evidence conclusively disproves. The evidence conclusively shows that they used no more precaution, made no more inquiries after March 9th than they did prior to March 9th. The testimony of the police officer shows that continuously from January to April 15th the place was frequented by drinkers of rubbing alcohol who purchased it there. The quantity of alcohol sold, as compared with that sold by legitimate drug stores in the City of Butte, shows that it was sold for purposes other than legitimate use. The statements given

by Varco, the clerk, and Dehne that they would in the future use precautions and not sell to repeaters, that is more than one bottle to the same customer in two or three days, is absolutely refuted by the fact that they did sell to Julius Johnson. The testimony of Julius Johnson is undisputed that he went in and made numerous and frequent purchases from Dehne and the other clerks without inquiries being made of him whatsoever as to why he needed alcohol, or needed so much alcohol, or what his use or intended use of it was.

In the face of such evidence the contention of the appellants, that between March 9 and April 15 they had ceased to carry on the business they admittedly theretofore had carried on, is incredible and the jury properly refused to accept the explanation.

NEITHER THE ACTS OF CONGRESS, NOR THE TREASURY REGULATION REQUIRES PROOF OF THE ACTUAL USE BY THE PURCHASER, OR INTENDED USE BY HIM, OF DENATURED ALCOHOL FOR BEVERAGE PURPOSES TO SUSTAIN A CONVICTION.

The appellants urge that as neither Julius Johnson, the government agent, nor anyone else intended to or did use the rubbing alcohol purchased, for beverage purposes, the evidence is insufficient to sustain a conviction.

Appellants have overlooked the testimony of the agent, on cross-examination, that in January, 1939, he had been in the city jail and talked to one incarcerated there for drunkenness, from whom the police had taken a bottle containing rubbing alcohol, and who said he had

purchased it from the store of the corporate appellant, and further overlooked the testimony of the police officer who testified as to rubbing alcohol users frequenting the store and purchasing alcohol and that he knew they were rubbing alcohol users because he had seen them drinking it and arrested them for it (R. 113).

The appellants seek to confine the evidence on behalf of the government, the evidence of Julius Johnson alone, the government agent, who testified that he did not purchase the rubbing alcohol to drink, but purchased it for evidence.

The appellants take the position that the law is, that unless the purchaser intends, at the time he purchases the alcohol, to use it for beverage purposes and does use it for beverage purposes, the intention of the seller to sell it for beverage purposes, and who actually sells it for beverage purposes, is immaterial and the sale by the seller for beverage purposes does not constitute a violation either of the applicable statutes or of the Treasury Regulation. Each case must of necessity depend upon its own particular facts.

Here the appellants were charged with carrying on the business of a retail liquor dealer without the purchase of the stamp required. Section 1397a, Title 26, Section 2803a I. R. C. and 3253 I. R. C. prohibits the carrying on of the business of retail liquor dealer without first paying the special tax. Section 3250 I. R. C. fixes the tax in the amount of $25.00 and Section 3254c I. R. C. defines retail dealer in liquors as one selling in quantities less than five wine-gallons to the same person at the same time.

The evidence of Julius Johnson was material and competent to be considered with the other evidence to prove

the business that was being carried on and the manner and method of carrying it on, irrespective of his intent with reference to the alcohol after he obtained it. The effort of Julius Johnson was to ascertain, if possible, the conditions under which and the purpose for which the appellants would sell rubbing alcohol, and the testimony of Johnson was material to go to the jury, as to whether or not it was the course of business of appellants to sell rubbing alcohol for beverage purposes, in light of the testimony of the police officer that known alcohol drunkards and users of alcohol for beverage purposes frequented the place of business of the corporate appellant and purchased alcohol from it. Certainly the jury could legitimately believe that if the appellants sold rubbing alcohol to Julius Johnson to drink, they would sell rubbing alcohol to anyone else purchasing it and intending to drink it.

REGULATION ARTICLE 146-A, No. 3.

Article 146-A, Regulation No. 3, where pertinent, reads as follows:

> "No person shall sell denatured alcohol * * * under circumstances from which he might reasonably deduce that it is the intention of the purchaser to produce the same for use for beverage purposes."

Section 151, Title 27, Sub-division 6, enacted August 27, 1935, a part of the liquor law repeal and enforcement act authorizes the Commissioner, with the approval of the Secretary of the Treasury, to prescribe regulations for carrying out the provisions of Chapter 3 of the Title.

The regulations, when promulgated, have the force and effect of law.

U. S. v. George, 228 U. S. 14;
U. S. v. Antikamnia Chem. Co., 231 U. S. 654;
Maryland Casualty Co. v. U. S., 251 U. S. 342;
Montana Eastern Ltd. v. U. S., 95 Fed. (2d) 897.

Section 153 of Title 27, provides:

> "Any person who shall * * * sell denatured alcohol * * * in violation of laws or regulations, now or hereafter in force, pertaining thereto, and such denatured alcohol * * * shall be subject to all provisions of law pertaining to alcohol that is not denatured, including those requiring the payment of tax thereon; and the persons so * * * selling the denatured alcohol shall be required to pay such tax."

This statute was enacted likewise August 27, 1935.

Manifestly, from these statutes, the intent of Congress was that denatured alcohol should not be sold for beverage purposes, tax free.

Appellants contend that there can be no violation of this regulation and Section 153, where the seller sells for beverage purposes, unless the purchaser purchases the alcohol for beverage purposes, intends to drink it, and actually drinks it.

Th fallacy of appellants' argument is that the regulation does not so provide. Nothing is said in the regulation about the intent of the purchaser. The prohibition is against the seller selling and not against the buyer buying.

The language of the regulation is plain, unambiguous and easily understood. Had it been the intent of the regulation to have made the violation depend upon the actual intended use, by the buyer of the alcohol, no doubt such intent would have been expressed in the regulation in language disclosing it. Had it so read, there might have been a basis for appellants' contention, but not so

reading, no other construction can be placed upon the regulation except that the violation is accomplished solely by the act of the seller in selling. Any other result would not be construction, but would be amendment by construction.

Appellants assert that the case of Sherman v. U. S., 10 Fed. (2d) 17, by the Circuit Court of Appeals for the Sixth Circuit, is authority sustaining their position. In that case the defendant was indicted for the sale of a four-ounce bottle of Jamica ginger.

As we read the decision the Court did not construe any regulation whatsoever, but did construe Section 13 of Title 27, U. S. C., a part of the National Prohibition Act.

From the opinion of the Court there is no fact similarity whatsoever between the Sherman case and the case at bar. Each case must of necessity depend upon its own particular facts.

In considering that case it must be borne in mind that the prosecution was for a violation of the National Prohibition Act, not for a violation of the revenue statutes. The statutes there considered by the Circuit Court were statutes enacted under National Prohibition Acts and not revenue statutes.

The Court holds that Jamaica ginger was a medicinal preparation not within the ordinary definition of intoxicating liquor, and that under Section 13 Jamaica ginger was exempted wholly from the operation of the National Prohibition Act.

It cannot be contended that alcohol is not within the ordinary definition of intoxicating liquor. Under Section 13, there was a distinction made between denatured alcohol and Jamaica ginger. Denatured alcohol is treat-

ed under sub-division (a) of the Section, and provided that it was exempt only when produced and used as provided by laws and regulations, now or hereafter in force. The only use the seller could make of denatured alcohol is to sell it.

The Court there determined that the purpose for which Section 13 was enacted was to prevent intoxication, saying:

> "We think the ultimate thing at which this part of section 4 was aimed was such intoxication as might be caused through the purchase of these preparations by one who intended to use them to drink."

Believing as the Court did that the purpose of the statute was to prevent intoxication and knowing that there could not be intoxication unless the consumer consumed the intoxicant sold to him, it gave to the section the construction it believed would effectually carry out the purpose for which the statute was passed.

However, here a different situation confronts the Court. The prosecution is not for enforcement of any prohibition act; it is for enforcement of the revenue acts. The prosecution is not to punish one for causing intoxication, but to punish one for a fraud on the revenue of the United States. Both Section 153 and the Regulation were passed after the repeal of the National Prohibition Act, and were passed specifically for the purpose of protecting the revenue. Thus the purpose of the regulation was entirely different from the purpose of Section 13, and a construction given to Section 13 to carry out the intent of Congress and gain the purpose sought to be gained by that section, would not carry out the purpose to be gained by the regulation before the Court, but would effectually

nullify it. This is particularly true when Section 153 is considered, for that Section specifically provides that the seller must pay the revenue. No mention is made in that section of the purchaser and no burden is placed on him to pay the revenue, and the regulation was specifically passed in aid of and in the enforcement of that section. Under Section 13, as construed by the Court, no intoxication could possibly ensue unless the purchaser consumed the intoxicant sold, thus his act was necessary to defeat the purpose of the statute. However, here, if the seller sells for beverage purposes, the purpose of the act is defeated irrespective of whether the purchaser drinks or not.

The Court there said it to be contrary to the general principals of criminal law that the mere intent to violate the law, not followed by actual violation, should be a crime. Such situation does not, under the facts of the case and under the regulation, appear hre, for the intent to do the act, that is to sell for beverage purposes, coupled with an actual sale by the seller for that purpose, constitutes the crime, or actual violation. The seller intended to and actually did what the regulation prohibited, and in so doing it is more than a mere intention, but constitutes the actual violation.

If, however, the decision of the Circuit Court of Appeals of the Sixth Circuit is authority in that Circut for the contention made by the appellants, it is not authority in this Circuit, as under the facts of this case the law of it is controlled by the decision of this Court in

Burnstein v. U. S., 55 Fed. (2d) 599,

It is undisputed that in this case the denatured alcohol was sold by the appellants indiscriminately, without any inquiries being made, without any questions being asked

and in whatever quantity the purchaser asked for. If it is said that rubbing alcohol is a medicinal preparation, then certainly the appellants did not ascertain from what ailment any of its customers were suffering from, whether they were sick or in need of medicine, or that the appellants knew the medicinal value thereof, if any, or what the medicine was good for.

In the Burnstein case the appellants were convicted of selling nine drinks of a medicinal preparation known as Margo Bitters, containing about 47% alcohol by volume.

This Court, in affirming the conviction said:

> "The appellants do not claim that they made any effort to determine whether or not the persons who purchased bitters from them were sick or in need of medicine. They did not ascertain from what ailment they were suffering and there is no evidence that they knew the medicinal value thereof, if any. There is no effort to determine the proper amount of bitters to be administered for the particular ailment with which the purchasers were afflicted."

The liquor here contained 73½% of alcohol.

Under the appellants' contention, if accepted, one could sell rubbing alcohol to the general public for beverage purposes indiscriminately, without the payment of tax and carry on such business without fear of punishment, for if an agent, seeking to enforce the revenue act, went into the place of business and purchased alcohol in the regular course of the business as carried on by such individual and under identical circumstances as those who were purchasing it for beverage purposes, even where the officer tells the seller that he desires it for beverage purposes, such evidence would not establish any violation of law because, as a matter of fact, the officer was acting

in the performance of his duties and was purchasing the alcohol for evidence and not to actually drink. Neither would the government's case be strengthened under their theory if the officer opened the bottle and took a drink because it would and could be contended that the taking of the drink was simply a subterfuge and was for the purpose of obtaining evidence and not for the real purpose of consuming the alcohol as a beverage. Appellants here go further and contend that the officer's testimony cannot even be accepted to establish the general course of business of one engaged in such business.

The Circuit Court of Appeals of the Fourth Circuit in Massei v. U. S., 295 Fed. 683,

came to an opposite conclusion from the Circuit Court of Appeals of the Sixth Circuit in the Sherman case in construing the identical statutes, the Court there saying:

> "When the defendant sold it under circumstances from which he could reasonably deduce that the purchaser intended to use it for beverage purposes, he committed the offense of selling intoxicating liquor for such purposes, precisely as he would have done had it been whiskey, gin or brandy, and was equally liable to imprisonment as a punishment therefor."

We submit that such is not the law and that the regulation should not be construed in such a way as to effectually nullify it as contended by appellants. That if such is the effect of the decision of the Circuit Court of Appeals of the Sixth Circuit in the case of Sherman v. United States, that this Court has laid down a different rule in the case of Burnstein v. United States, and that under the rule as laid down by this Court in that case, the evidence is amply sufficient to sustain the verdict of the jury and the judgment of the Court.

II.

APPELLANTS' ASSIGNMENTS OF ERROR II AND VI.

ASSIGNMENTS OF ERROR II AND VI ARE NOT AVAILABLE TO APPELLANTS HERE BECAUSE OF LACK OF ANY PROPER FOUNDATION IN THE RECORD.

By assignments of error II and VI the appellants complain of the action of the trial court in overruling the motion of the appellants for a directed verdict in their favor and a verdict of acquittal and to dismiss the action at the close of all of the evidence.

In argument the appellants assert that the evidence is insufficient to sustain the verdict and judgment on any counts except possibly those arising out of the last two sales made on April 15, 1939. When the record is examined it appears that at the close of the government's case in chief the appellants made a joint motion that the Court direct a verdict in their favor of not guilty and for dismissal of the action upon the grounds, among others, that the government had failed to prove the matters charged in the indictment, and in each count, beyond a reasonable doubt, insufficiency of the evidence to prove the matters and things charged in the indictment and insufficiency of the evidence to show the appellants, or either of them, were guilty of the offense or offenses charged in the indictment, or any count thereof (R. 140). At the close of all of the evidence the appellants requested that the same motion be considered as made. The Court considered it made and denied and exception was noted.

The motion amounted to a general motion and under

it the appellants requested the Court jointly to direct the jury to return a verdict of not guilty on all counts. No motion was made by the appellants, either separately or jointly, for a direction of verdict of not guilty by the Court as to any particular count. The motion was for a verdict of not guilty as to all counts and this motion the Court denied. The Court was correct in denying the motion made to it.

The motion being joint, it must have been good as to both appellants before it could have been sustained.

Condic, et al. c. U. S., 90 Fed. (2d) 786.

If there was sufficient evidence to go before the jury as to any count, the Court properly denied the motion as made.

Matters v. U. S., 261 Fed. 826.

Appellants, in their argument, impliedly concede that there was evidence sufficient to go to the jury as to certain counts of the indictment, namely, as to the sales made by the clerk Maenpa, and by this concession the appellants acknowledge that the motion as to those counts was not good. This concession, we believe, without question, demonstrates that the action of the trial court in overruling the motion as made was correct. Again, the Court charged the jury that under the evidence they had a right to find the appellants guilty on all counts, or not guilty on all counts, or guilty on some counts and not guilty on the others (R. 202, 218). The appellants took no exception to the charge of the Court (R. 220).

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR A VERDICT OF ACQUITTAL.

Having heretofore detailed the evidence we shall not do so again. Julius N. Johnson testified as to the sales made to him. He was not the only witness to the sales, as the appellant Dehne was a witness to some of them and the other clerks were witnesses to other of the sales and they did not testify as to the sales to Johnson and did not contradict his testimony in any respect whatsoever. However, the evidence of the government in support of each of the counts of the indictment was not confined to the testimony of Julius Johnson, but numerous witnesses testified and there was a great deal of evidence produced by the government in support of the charges made against the appellants. The method and manner in which the appellants carried on their business as a retail liquor dealer without paying the tax was all evidence competent to go to the jury to be considered with the testimony of Julius Johnson in support of the counts in the indictment which charged the sale of alcohol to him and the sale of alcohol to him in unstamped containers. This Court has held that if there is any "legal, competent, or substantial" evidence sustaining the charge it should be submitted to the jury,

Maugeri v. U. S., 80 Fed. (2d) 199,

and it cannot be gainsaid that there was competent and substantial evidence to sustain the indictment. The weight of the evidence or the question of guilt or innocence is for the jury after considering all of the evidence submitted to it.

This Court has said that its function on appeal was not

to weigh the evidence, or even be convinced itself beyond a reasonable doubt that a defendant is guilty, that its only duty is to declare whether the jury had a right to pass on what evidence there was.

Craig v. U. S., 81 Fed. (2d) 816.

We respectfully submit that the assignments of error are without merit and that no error was committed by the trial court in the ruling complained of.

III.

APPELLANTS' CONTENTION THAT THE IMPOSITION OF SENTENCE ON EACH COUNT OF THE INDICTMENT CONSTITUTES DOUBLE PUNISHMENT CANNOT BE CONSIDERED.

The appellants urge that the Court, in sentencing on each of counts two to eleven inclusive, and on counts twelve to twenty-one inclusive, and on count twenty-two, punished the appellants twice for the same offense and, therefore, committed error.

The question is not properly before the Court and cannot be considered by it. The record of the trial of the case is barren of any suggestion, on behalf of the appellants, that the offenses charged in counts two to eleven inclusive were the same as the offenses charged in counts twelve to twenty-one inclusive, and in count twenty-two, and that any verdict of guilty by the jury would be convicting the appellants twice for the same offense, or any imposition of judgment by the Court would be a double punishment for the first offense. The question was not in any wise raised or presented to the Court. Neither was the action of the trial court, in sentencing as it did, specified by the appellants as error in their specifications

filed herein. At page 7 of their brief appellants set forth the assignments that they intend to rely upon, with appropriate references to the transcript page where found, and a reading of those errors disclose that the action of the trial court, here sought to be revealed, was not assigned as error.

Under such circumstances the action of the trial court cannot be reviewed by this Court and there is nothing before this Court in that regard.

Baldwin v. U. S., 72 Fed. (2d) 810;
Alberty v. U. S., 91 Fed (2d) 461;
Pruett v. U. S., 3 Fed. (2d) 353.

THE SENTENCE OF THE TRIAL COURT DID NOT CONSTITUTE DOUBLE PUNISHMENT.

Counts two to eleven charged the sale of denatured alcohol in violation of the Treasury Regulation. Counts twelve to twenty-one charged the sale of denatured alcohol, the containers of which did not have the strip stamp affixed thereto, and count twenty-two charges the possession of denatured alcohol with intent to sell it.

Under the Treasury Regulation it was a violation to sell the denatured alcohol for beverage purposes, and that without regard to whether the sale was made in containers having a strip stamp affixed thereto or not. Section 1152a, Title 26, re-enacted Sec. 2803 of R. C. makes it unlawful to sell distilled spirits unless the immediate container has affixed thereto the stamp provided for in the section.

The fact is that the sale was made in unstamped containers.

This Court in

King v. U. S., 31 Fed. (2d) 17;
Affirmed 280 U. S. 521;

said the test was as to identical offenses; that the offense must be the same in law and in fact; that the plea is not good if the offenses be distinct in law, however nearly they may be connected in fact.

The Court again said that the test of identity is whether the same evidence is required to sustain both. If not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by statute.

Macklin v. U. S., 79 Fed. (2d) 756.

Applying these tests, it is clear that the Court did not err. Under counts two to eleven inclusive, the charge there was the sale of alcohol for beverage purposes. It was not an element of the offense charged and neither was any proof required, to sustain a conviction, to establish whether or not the immediate container had affixed thereto the strip stamp required by statute. Any such evidence as offered would have been entirely immaterial and properly rejected by the trial court.

The charge in counts twelve to twenty-one inclusive, was the sale of the alcohol in immediate containers on which no stamp was affixed. Here it became necessary to prove another and additional element in order to sustain a conviction; that is, not only the sale of denatured alcohol, but that it was in a container upon which no strip stamp was affixed, and the proof required to sustain a conviction under counts two to eleven inclusive would not sustain a conviction under counts twelve to twenty-one inclusive.

Likewise, with count twenty-two, charging possession with intent to sell. In order to sustain a conviction under that count, it would not be necessary to prove an actual sale, whereas to sustain a conviction on counts two to twenty-one inclusive, it was an essential ingredient of the offense to prove an actual sale and a conviction could not be had without such proof.

In

Remaley v. Swope, 100 Fed. (2d) 31,

this Court held that the offense of carrying on the business of a distiller without giving bond was separate and distinct from that of making and fermenting mash, wort or wash fit for distillation, or for the production of spirits or alcohol in a business or premises other than a distillery duly authorized according to law.

Judge Cavanaugh of the United States District Court of Idaho held that the unlawful possession of intoxicating liquor and transportation thereof are two separate and distinct offenses.

U. S. v. One Oldsmobile Coupe, 22 Fed. (2d) 441.

This Court again asserted the test was whether or not the same evidence is required to sustain the various charges.

Ross v. U. S. 103 Fed. (2d) 600.

In the Ross case this Court said that it had specifically declined to follow the case of Cain v. U. S., 19 Fed. (2d) 472, cited and relied upon by the appellants in their brief. The case of Nelson v. U. S., 131 U. S. 176, cited and relied upon by the appellants here, was likewise cited and relied upon by the appellant in the Ross case.

IV.

APPELLANT DEHNE PROPERLY CONVICTED OF CARRYING ON THE BUSINESS OF RETAIL LIQUOR DEALER.

Appellant Dehne asserts the Court erred in sentencing him on count one, for carrying on the business of retail liquor dealer, as he was merely an employee and could not carry on such business.

The assignment of error is not properly before the Court. The argument is made under assignment of error VI, and the assignment of error is that the Court erred in denying and overruling the motion of the United Cigar Whelan Stores Corporation, a corporation, and Edgar Dehne for a directed verdict of not guilty.

The record discloses that a joint motion was made by both appellants for a verdict of not guilty. Being joint it must be good as to all, or must be denied by the trial court.

Condic v. U. S., 90 Fed. (2d) 786.

Obviously the motion was not good as to the corporate appellant, the argument made on behalf of Dehne being that the corporate appellant owned the business and it alone could carry it on. This contention is one that could only be made by Dehne and is not common as to both appellants. In order to have properly presented it to the trial court, Dehne should have made a separate motion on that ground. Failing to do so, in ffect he is in the position of a defendant who, at the close of all of the evidence, fails to move the Court for a directed verdict and cannot thereafter raise the point.

Girson v. U. S., 88 Fed. (2d) 358.

Further, the Court charged that under the evidence Dehne could be convicted on that count, or acquitted on that count, as the jury viewed the evidence, and no exception was taken to the charge.

DEHNE WAS PROPERLY CONVICTED ON COUNT ONE.

It is true that Dehne had no proprietary interest in the business. He, however, was something more than a mere employee. The United Cigar Whelan Stores Corporation, being a corporation, could act only through responsible agents. He was the manager of the store and its most responsible agent in the store. He directed the course of business, directed the actions of the clerks, ordered the alcohol that was sold and participated in its sale.

Section 550 of Title 18, U. S. C., defines a principal as "whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission is a principal."

Appellants cite the case of Anderson v. U. S., 30 Fed. (2d) 485, from the Fifth Circuit, as holding that an employee cannot be an accomplice and, therefore, a principal in conducting a business unless he is one of the proprietors. If this case so holds, its holding is not only against the weight of authority, but is specifically against the rule as announced by this Court.

In

> Vukich v. U. S., 28 Fed. (2d) 666,
> Certiorari denied, 297 U. S. 847,

the defendant was indicted for carrying on the business

of a distiller without having given bond as required by law. The trial court was requested to charge the jury that before a conviction could be had they must find, beyond a reasonable doubt, that the defendant was either the proprietor of the business, or had a proprietary interest in it. The Court refused to give this instruction. On appeal this Court held that one who aids, and abets the carrying on of an unlawful business is liable as a principal, and need have no proprietary interest in the busness, and affirmed the action of the trial court. This holding was reaffirmed by this Court in

Cvitkovic, et al., v. U. S., 41 Fed. (2d) 682;
Borgia v. U. S., 78 Fed. (2d) 550.

The Vukich case, supra, was cited with approval in that respect and followed by the Circuit Court of Appeals of the Eighth Circuit in

Parent v. U. S.;
Antinoro v. U. S., 82 Fed. (2d) 722.

The Circuit Court of Appeals of the Seventh Circuit had before it the question as to whether or not an employee could carry on the business of a wholesale liquor dealer as construed by Section 1397 (a) (1), Title 26. The Court in affirming the conviction and holding that an employee could be so convicted, said:

> "Obviously a servant will aid and abet another in the carrying on of such business and become a principal if, with knowledge of the business, its purpose and its effect, he consciously contributes his efforts to its conduct and promotion, however slight his contribution may be. Thus the court could not have followed the law and given the charge requested."

Wainer v. U. S., 82 Fed. (2d) 305.

The decision of the Circuit Court of Appeals was affirmed by the Supreme Court.

Wainer v. U. S., 299 U. S. 92.

We respectfully submit that the contention of the appellant Dehne is without merit.

V.

EVIDENCE OF SALE BY EMPLOYEES OTHER THAN DEHNE COMPETENT.

At the trial, witness Johnson testified to his entry of the store and purchasing alcohol from Dehne. He testified that he went into the store on the 9th of March, 1939 (R. 63) at 7:25 in the evening (R. 64) and found the clerk Varco there. He was then asked what he said to the clerk and the objection was made by the appellants to any evidence concerning any other person than Mr. Dehne, who was the person indicted in the complaint. The indictment reads to the appellants throughout, which would mean Edgar Dehne and the United Cigar Whelan Stores Corporation. The objection was overruled by the Court and exception taken (R. 65). This is the reason for specification of error No. III.

There seems to be no argument in support of Assignment of error No. 111 and no authorities are cited holding the Court erred in the admission of the testimony and no reason is given in support of the assignment.

The corporate appellant was named as a defendant on all counts. The witness was testifying as to the occurrences in the corporate appellant's place of business on the 9th of March, 1939, within the time specified in the indictment and as to occurrences had between himself and an admitted employee of the corporate appellant conduct-

ing the business. As it is conceded that the business was actively carried on by the corporate appellant through its clerks and employees, we know of no reason why such testimony would not be competent and within the issues. There is no contention made that the corporate appellant is not liable for the acts of all of its employees.

If it is attempted to be asserted that the evidence was not competent as to Dehne, but was competent as to the corporate appellant, then Dehne is not in a position to urge the matter here under the objection made. The objection was a joint objection made on behalf of both of the appellants, and not being good as to the corporate appellant, it, of necessity, must have been overruled by the trial court. Had it been contended before the trial court that the testimony was not competent as to Dehne, he should have objected to it on that ground and had the Court admonish the jury that it was not to be considered as against him. This was not done. Not having done so, there is no foundation now in the record for him to assert that the trial court was in error.

Objections must be specific,

Duncan v. U. S., 68 Fed. (2d) 136 (9 C. C. A.)

VI.

CONVICTION OF DEHNE ON ALL COUNTS INVOLVING SALES WAS PROPER.

Under its assignment of error VI, it is urged that under no circumstances could Dehne have been convicted on any sales count except for the sales personally made by him.

As heretofore pointed out the alleged error is not available to Dehne here. The assignment of error is based

upon the joint motion of both appellants, asking a direction of a verdict of not guilty. There was no separate motion made by Dehne and neither was there any motion made by Dehne as against each count separately, or asking the court to direct a verdict of not guilty as to the counts in which he did not personally make the sale. The motion being joint the Court properly overruled the motion as made, for irrespective of any liability of Dehne for the acts of the other clerks, it is not questioned that the corporate appellant was liable for them and the motion was not good as to it.

On the record the trial court would have been in error had it directed a verdict in favor of Dehne on the counts in which he did not personally sell the alcohol. The record discloses, from the testimony of Dehne and the other clerks, that Dehne was and had been the manager of the store for twelve years (R. 143); that he ordered the alcohol (R. 157); that on his own initiative he eventually ceased the sale of it (R. 150); that the clerks worked under him (R. 166); and that after receiving the warnings from the officers of the Alcohol Tax Unit, he conferred with the clerks with reference to their future conduct in the sale of the alcohol (R. 150, 167 and 183).

Under this evidence there can be no question but what Dehne was in control of the store, in control of the action of the clerks and with the authority to direct and actually directed their action with reference to the sale of this alcohol in the store and in carrying on the business, and there was ample evidence before the jury for them to determine whether or not the clerks did carry on the business and sell the alcohol as directed by Dehne.

There was no contention made at the trial by Dehne

that in selling the alcohol as they did, the clerks violated any instructions or directions given by him.

Under these circumstances the appellant Dehne is a principal as defined by Section 550 of Title 18.

However, it is urged that there was no evidence to show that Dehne was present in the store at the time of the sales by the other clerks. That has nothing to do with Dehne's liability. His presence was not required as a prerequisite to his being a principal.

In

Borgia v. U. S., 78 Fed. (2d) 550,

this Court said:

> "It is not necessary that an aider or abetter be present at the actual commission of the offense, or know the details thereof."

We respectfully submit there is no merit in the appellants' assignments of error III and VI.

VII.

NO EVIDENCE WAS INTRODUCED THAT A CRIMINAL OFFENSE WAS COMMITTED BY THE APPELLANTS OTHER THAN THOSE SET OUT IN THE INDICTMENT.

By assignment of error IV the appellants urge that the Court committed error by permitting testimony indicating inferentially that the appellants were guilty of violations other than those set out in the indictment.

The indictment charged in count one that the appellants carried on the business of retail liquor dealer, without paying the tax, between the 9th of March, 1939, and the 15th of April, 1939. When the police officer Beadle was on the witness stand, after testifying that he had

been stationed in front of the place of business of the corporate appellant for sometime, he was asked whether he had made any observations, or what he had seen with reference to the United Cigar Store and the sale, if any, of rubbing alcohol. The objection was made that the evidence did not relate to any of the purchases alleged in the indictment, but merely to general purchases. The objection was overruled and he answered that he had noticed dehorns and rubbing alcohol drunkards going into the store and coming out with bottles of rubbing alcohol, sometimes in packages and sometimes unwrapped. The question called for his observations as to the business, its course and conduct carried on, between the first of January and the period between the first of January, 1939 and the Ninth of March, 1933 was without the indictment or too remote.

The question did not seek to elicit and did not elicit any information with reference to any other or different offense. It sought information with reference to the carrying on of the business that the appellants were charged with having carried on. It is competent to prove sale of liquor in proving the charge of carrying on the business of a retail liquor dealer.

Hunter v. U. S., 264 Fed. 831.

It is impossible to carry on the business of a retail liquor dealer without selling liquor. One of the things that the sales prove is the fact that the one charged possessed liquor to sell. However, the offense charged is the carrying on of the business and the proof of other sales is competent to establish the charge.

Ledbetter v. U. S., 170 U. S. 606.

In

Campanelli v. U. S., 13 Fed. (2d) 750,

decided by this Court, defendants were indicted for a conspiracy to violate the National Prohibition Act, the dates alleged in the indictment being between February 1, 1924, and October 8, 1924. This Court held that there was no error in permitting evidence of settlement of accounts between the two defendants for liquor transported in the year 1923.

A like holding was made by this Court in

Rubio v. U. S., 22 Fed. (2d) 766.

The rule laid down in Cyc. is that the state may prove sales to other persons, or sales on other dates than those charged, not only about the time named in the indictment, but for a considerable period of time before, where there is evidence showing a continuity of the business.

16 C. J., Section 1175, Page 606.

Where the charge in the indictment is that one is carrying on a business in the selling of a certain article, it is certainly competent evidence to go to the jury to show that the place of business was frequented by those who used and desired the article sold and who were seen to leave the premises in possession of the article sold. The weight of such evidence, of course, is for the jury, but that does not effect its competency.

Not only was the evidence competent to prove the charge of carrying on the business, but it was equally competent to prove the charge of selling to Johnson under circumstances from which the seller could reasonably deduce that the alcohol was to be used for beverage purposes. Certainly, if the appellants were selling denatured alcohol indiscriminately to any purchaser for beverage

purposes, that would be one of the circumstances within their knowledge and likewise a circumstance to be taken into consideration by the jury, along with all of the other facts and circumstances to determine just what the circumstances were under which the sales of denatured alcohol were made to Johnson, and what the appellants should have deduced from those circumstances.

Again, if it be said that the objection was well taken at the time it was made and the evidence should have been excluded at that time, nevertheless the evidence is now properly in the record.

It appeared from the evidence on behalf of the appellants, introduced not only in their case in chief, but introduced by them on cross examination in the government's case in chief, and by the offer of the statement of Dehne and the other clerks in evidence, that the appellants had, prior to the First of January, 1939, carried on the business of retail liquor dealer. Under the facts of the case there can be no dispute as to that and it is not seriously contended otherwise by appellants in their brief. The defense of the appellants was not that they had not been engaged in the business of a retail liquor dealer in selling denatured alcohol, but that after the first of January, when they received their last warning from the officers, they ceased the business. Thus the appellants had been carrying on a continuing business and it was competent for the government to show that they still continued that same business in spite of their contention that they ceased it, and for that purpose and show a continuing business the evidence became and was competent in the case.

There was no effort to prove by the government other

offenses committed by the appellants. The government did prove in the case the continuous carrying on of the business, that the appellants were charged with carrying on, over a part of the time.

CONCLUSION.

In conclusion we respectfully submit that appellants were fairly tried upon the charges contained in the indictment that ample competent evidence was introduced to establish the truth of the charge and to support the verdict of the jury as to their guilt; that the appellants were accorded every right afforded to them under the law; that no error was committed that in any respect affected their substantial right, and that the verdict of the jury and the judgment of the Court is amply sustained by the evidence and should be affirmed.

Respectfully submitted,

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